89-1360

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ALLAN DEVORE, PETITIONER

v.

STEPHEN R. KERR AND
WILLIAM O. JOHNSTONE, RESPONDENTS

*PETITION FOR A WRIT OF CERTIORARI TO*
*THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

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## PRELIMINARY MATTER

## QUESTIONS PRESENTED

1. What is the proper standard of review by an appellate court of a district court's award of sanctions under Rule 11 of the Federal Rules of Civil Procedure.

2. Do the administrative functions of the court in promulgating rules of procedure override the general substantive rules of law.

## LIST OF PARTIES

The Petitioner is Allan DeVore.

The Respondents are Stephen R. Kerr and William O. Johnstone.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1990**

---

**ALLAN DEVORE, PETITIONER**

**v.**

**STEPHEN R. KERR AND**
**WILLIAM O. JOHNSTONE, RESPONDENTS**

---

***PETITION FOR A WRIT OF CERTIORARI TO***
***THE***
***UNITED STATES COURT OF APPEALS***
***FOR THE TENTH CIRCUIT***

---

Petitioner, Allan DeVore, respectfully prays that a writ of certiorari issue to review the orders and judgments of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 17, 1989 and October 31, 1989.

## OPINIONS BELOW

The orders and judgments of the Court of Appeals, which are unreported, appear in Appendix A and B. The orders of the United States District Court for the Western District of Oklahoma, which are unreported, appear in Appendix C through I.

## JURISDICTION

The orders and judgments of the Court of Appeals were entered on August 17, 1989 and October 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

Rule 11, Federal Rules of Civil Procedure.

## STATEMENT OF THE CASE

1. Nature of the Controversy.

The Petitioner was retained by his clients to file a lawsuit against the Respondents, as officers and directors of United Oklahoma Bank ("UOB") and other defendants for violations of the RICO Act, 18 U.S.C. §1961-62, mail fraud, 18 U.S.C. § 1341, and common law fraud. Prior to commencing the action, Petitioner and his clients were advised of, or obtained, the following facts with respect

to the validity and reasonableness of their claims: (1) the Respondents represented to Petitioner's clients that the "prime" or "base" rate was the lowest rate that UOB loaned to its best commercial customers; (2) other UOB customers advised Petitioner's clients that Respondents had informed them that the UOB's "prime" rate was the rate at which UOB made loans to its best commercial customers; (3) Petitioner's co-counsel in this case advised the Petitioner that UOB had made various loans to UOB customers at less than UOB's "prime" rate; (4) Petitioner inspected documents maintained by UOB, which had been transferred to the custody of the FDIC, and determined that a significant number of loans had been made at less than the "prime" rate; and (5) Petitioner met with a former vice-president and loan officer of UOB, and obtained an affidavit reflecting that it was UOB's policy to represent to commercial customers that UOB's "base" rate was the lowest rate at which the bank made loans to its commercial customers. Based upon this factual inquiry, Petitioner commenced this action on behalf of his clients.

Respondents filed a motion to dismiss the complaint under Fed.R.Civ.P. 9(b) and 12(b)(6) which was treated as a motion for summary judgment by the district court and granted. The district court further awarded Respondents sanctions in the form of attorney's fees and costs against the Petitioner and his clients. The district court held that testimony advanced by Petitioner's clients in another case in which he did not represent them negated material allegations contained in the complaint.

The district court further held that Petitioner and his clients failed to conduct a reasonable inquiry before filing the complaint to determine if the allegations contained therein were well-grounded in fact and warranted by existing law. Finally, the district court held that Petitioner's filing of an amended complaint naming the Respondents pending the court's ruling on Petitioner's motion to reconsider the order granting summary judgment in favor of Respondents was not warranted by existing law.

2. The Proceedings Below.

On February 12, 1988, the Petitioner filed a lawsuit on behalf of his clients against the respondents and other defendants, charging common law fraud, violations of the RICO Act, 18 U.S.C. §1961-62, and mail fraud, 18 U.S.C. §1341. The Respondents and the other defendants moved separately to dismiss the complaint. Over Petitioner's objection to Respondent's motion to dismiss, the district court treated the motion to dismiss as a motion for summary judgment and granted summary judgment in favor of Respondents. In addition, the district court granted the other defendants' motion to dismiss and granted the Petitioner ten days to amend the complaint. The Petitioner filed a motion to reconsider the order granting summary judgment in favor of Respondents. The Respondents filed a motion to impose sanctions on Petitioner's clients. The Petitioner filed an

amended complaint naming the Respondents and the other defendants which remedied the alleged defects contained in the original complaint. The Respondents then amended their motion for sanctions to seek sanctions against Petitioner as well as his clients. The district court denied Petitioner's motion to reconsider. After a hearing, the district court granted Respondent's motion and awarded sanctions against Petitioner and his clients.

On appeal, the Tenth Circuit affirmed the lower court's award of sanctions against the Petitioner and his clients. The Appeals Court held that the district court did not abuse its discretion in awarding sanctions against Petitioner and his clients.

## REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision which is in direct conflict with earlier holdings of other Appeals Courts. The Appeals Court has reviewed the factual and legal conclusions of the district court in arriving at its decision to affirm the award of sanctions against the Petitioner by using the abuse of discretion standard of review rather than the de novo standard of review or a hybrid thereof as are used in other circuits. In its opinion, even the Court of Appeals recognized the varying standards of review used in other circuits although it chose not to endorse a less stringent standard in Rule 11 cases. Since there is a clear conflict between

the circuits as to the proper standard of review on sanctions cases, review by this Court is urgently required.

## I. THE DECISION BELOW IMPROPERLY HELD THAT THE PETITIONER'S ACTIONS, WHEN REVIEWED UNDER THE ABUSE OF DISCRETION STANDARD RATHER THAN UNDER THE DE NOVO STANDARD, WERE IN VIOLATION OF RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Tenth Circuit Court of Appeals has adopted an "abuse of discretion" standard of review across the board to all Rule 11 issues. *Adamson v. Bowen*, 855 F.2d 668 (10th Cir. 1988). Similarly, other circuits have adopted the same standard. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988); *Century Products, Inc., v. Sutter*, 837 F.2d 247 (6th Cir. 1988); *EBI Inc. v. Gator Industries, Inc.*, 807 F.2d 1 (1st Cir. 1986); *Stevens v. Lawyers Mutual Liability Insurance Co.*, 789 F.2d 1056 (4th Cir. 1986); *Cf. Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718 (3rd Cir. 1988).

The Eighth Circuit Court of Appeals' review of a district court's Rule 11 award consists of three prongs. The factual findings that form the basis of the asserted violation are reviewed under the clearly erroneous standard. The determination that a violation of the rule as shown by those findings is a legal conclusion which is

reviewed de novo. Finally, the appropriateness of the sanction is reviewed for abuse of discretion. *U.S. v. Carasis*, 863 F.2d 615 (8th Cir. 1988). Similarly, the Ninth and Seventh Circuit Courts of Appeal have adopted the same standard. *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *King v. Idaho Funeral Services Ass'n*, 862 F.2d 744 (9th Cir. 1988); *Brown v. Federation of State Medical Board of U.S.*, 830 F.2d 1429 (7th Cir. 1987).

Some courts take either a de novo or an abuse of discretion approach, depending on the type of Rule 11 violation alleged. The circuits apply de novo review to allegations that a pleading was not well grounded in existing law or supported in a good faith argument for its extension, modification, or reversal; but they review for abuse of discretion if the pleading is alleged to be either not well-grounded in fact or imposed for any improper purpose. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985).

The idea that an Appellate Court should have a predisposed idea about the validity of a lower court's finding that a pleading is not well-grounded in fact is contrary to the basic principles underlying our justice system. While a lower court may be in a better position to weigh the facts and reach a factual finding therefrom, the same cannot be said for legal determinations made by the district court. Whether a pleading or motion is legally sufficient involves a question of law; accordingly,

the Appellate Courts are in as good a position as the lower courts in making this legal determination and the de novo standard of review is the appropriate standard to be applied in these instances.

## II. THE DECISION BELOW IMPROPERLY IMPOSED SANCTIONS UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE ON AN ATTORNEY WHO FOLLOWED THE GENERAL SUBSTANTIVE RULES OF LAW.

The Federal Rules of Civil Procedure are designed with the purpose of implementing the exercise of jurisdiction which has been conferred by Congress or statute. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946); *Edwards v. E.I. Dupont de Nemours & Co.*, 183 F.2d 165 (5th Cir. 1950). Any construction of Fed.R.Civ.P. 11 must necessarily begin with an eye toward the Rules Enabling Act, 28 U.S.C. §2072. After delegating to the Supreme Court the authority to regulate practice and procedure, The Rules Enabling Act reads, in pertinent part, "[S]uch rules shall not abridge, enlarge or modify any substantive rights..." *Port Drum Co. v. Umphrey*, 119 F.R.D. 26 (E.D. Tex. 1988).

In order for Rule 11 to be valid under the Rules Enabling Act it must be of a procedural nature, rather than substantive. "The test must be whether a rule really regulates procedure, - the judicial process for enforcing rights and duties recognized by substantive law and for

justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). *Quinones v. Pennsylvania General Ins. Co.*, 804 F.2d 1167 (10th Cir. 1986). Rule 11 is a rule that regulates procedure rather than a rule that creates new substantive rights. *Matter of Adams*, 734 F.2d 1094 (5th Cir. 1984).

Since it is the administrative function of the Court to promulgate rules such as Rule 11, it naturally flows that when disciplinary rules conflict with general substantive rules of law, the substantive rules control. In the case at hand, the Appeals Court affirmed the award of sanctions against the Petitioner holding that the filing of an amended complaint naming the Respondents, after having been granted leave by the district court to file the same as to Respondents' co-defendants pending the court's ruling on Petitioner's motion to reconsider, was in violation of Rule 11. The court reached this conclusion even though the order granting Respondents' motion for summary judgement was not a final appealable order pending the district court's decision on Petitioner's motion to reconsider. In reaching its decision, the lower court relied on the provisions of procedural Rule 11 rather than on the general substantive law which is controlling in this matter.

The courts have held that the filing of an amended complaint complete in itself, not referring to the original complaint or prior amendments, is an abandonment of all prior averments not contained in the amended complaint.

Accordingly, no reference can be made to the original pleading abandoned by substituting a pleading. *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982); *Edwards v. Andrews, Davis, Legg Bixler, Milsten and Murrah, Inc.*, 650 P.2d 857 (Okla. 1982). The filing of an amended complaint which omits an individual as a party defendant has the effect of dismissing such a party from the cause of action. *Gravitt v Southwestern Bell Telephone Co.*, 396 F.Supp. 948 (1975). The same rule followed by state courts is applicable under federal rules, so that in a federal court an amended complaint supercedes and replaces any prior complaint filed by the plaintiff. *Buck v. New York Central Railroad*, 275 F.2d 292 (7th Cir. 1960). *Loux v. Rhay*, 375 F.2d 55 (9th Cir. 1967), held that an amended complaint supercedes the original, the latter being treated as nonexistent.

The Petitioner was required to name all of the party defendants, including Respondents, in his amended complaint so as not to abandon his client's claims against Respondents. By filing an amended complaint which is complete in itself, a plaintiff abandons his former complaint and all matters not restated in the amended complaint. *Adams v. Lederly Laboratories*, 569 F.Supp. 234 (W.D. Mo. 1983). In *Adams*, the court stated:

> All this being so, I have considerable conceptual difficulty understanding how a defendant who is wholly omitted from an amended petition can be said to remain in a case, any more so than would a claim against him which is omitted. In theory,

> the original petition has ceased to exist - has evaporated, as it were - as a vehicle by which any relief can be granted to plaintiff. *Id.* at 240.

The filing of an amended complaint by Petitioner which named all of the original parties, including Respondents, was consistent with and authorized by the prevailing substantive law in this area. Petitioner's reliance on the general substantive rules of law when no exceptions exist therein cannot give rise to Rule 11 sanctions. To do so would allow the procedural aspects of Rule 11 to modify and abridge the prevailing substantive law in this area and would clearly be in violation of the Rules Enabling Act under which the Court received its authority to invoke procedural rules.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. CIV-88-226-B |
| STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES,INC., an Oklahoma bank holding corporation, | ) | |
| Defendants. | ) | |

**ORDER GRANTING DEFENDANTS SUMMARY JUDGMENT**

This matter comes before the court on a Motion to Dismiss by defendants Stephen R. Kerr and William O. Johnstone. The plaintiffs' argument focuses on a motion to dismiss. But the plaintiffs, as well as the defendants, have presented matter s outside the pleadings by way of attachment to the briefs for the court's consideration. The plaintiffs may not have their exhibits and affidavit considered without the court considering the defendants' attachments also. When the court considers matters outside the pleadings, the motion is to be considered as a motion for summary judgment under Fed.R.Civ.P. 56. See Fed.R.Civ.P. 12(b). Rule 56 requires that summary judgment be rendered then "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). After the moving party presents evidence that there is "no genuine issue of material fact," it is the responding parties' duty to set forth facts in rebuttal. Fed.R.Civ.P. 56. The defendants' motion is granted pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

During the period between October, 1981, and February, 1986, the plaintiffs, Hill Resources, Inc., Irving A. Hill, and Ronald M. Hill, borrowed money from the defendant United Bank of Oklahoma ("Bank"). The defendants Stephen R. Kerr and William O. Johnstone were officers of the Bank at the time of the filing of this lawsuit. In return for the borrowed money, the plaintiffs executed notes which provided for interest at rates based

on the Bank's "prime rate" or "base rate". The Bank periodically mailed the plaintiffs notices or statements which recited the amount of interest.

During this period Ronald M. Hill served as a director of the Bank. As a member of the board, Ronald Hill had constructive, if not actual knowledge, of the interest rates being charged to the customers of the Bank.

The facts in the case of *Pappas v. NCNB Nat'l. Bank of North Carolina*, 653 F.Supp. 699 (M.D.N.C. 1987) are almost identical to the case at bar. In *Pappas*, the bank allegedly "misrepresented the prime rate by sending out monthly statements which overstated its prime rate." Id. at 703. The plaintiffs misunderstood the meaning of the term "prime rate", and the defendants did not correct the misunderstanding. The defendant mailed out statements reflecting the interest rate charged to the defendants. The court found that although the plaintiffs made the wrong assumption of the interest rate, the failure to correct this incorrect assumption was not a material misrepresentation by the bank. The trial court found that the plaintiffs have failed to establish either common law fraud or mail fraud and granted summary judgments.

The defendants, Kerr and Johnstone, through the depositions of the plaintiffs, have shown that plaintiffs' basis of fraud is the plaintiffs' own incorrect assumption that the terms "prime rate" and "base rate" were the rates charged the most credit-worthy customers. The plaintiffs

have failed to present any facts showing (1) that either Kerr or Johnstone represented that the term "base rate" meant the rate available to the Bank's most credit-worthy commercial borrowers; (2) that Kerr or Johnstone directed any employee to use the United States mail to make such a representation; or (3) that such a representation was made to the plaintiffs.

The plaintiffs do present the affidavit of Mr. Lippman. Mr. Lippman posits that it was the policy of United Oklahoma Bankshares, Inc. to represent its prime rate to be the rate charged the most creditworthy customers. However, plaintiffs have not shown that this representation was made to them. Thus, this policy cannot be the basis of plaintiffs' action for fraud. The plaintiffs have not presented any evidence to show a genuine issue of material facts.

Plaintiffs' RICO claim must be supported by a statutorily specified underlying fraudulent act. The plaintiffs, having failed to show any fraudulent act by either Kerr or Johnstone, have not presented a RICO cause of action. This court thus finds that the defendants Kerr and Johnstone are entitled to summary judgment as a matter of law. See *Pappas*, 653 F.Supp. at 703-04.

Additionally, Ronald M. Hill has previously litigated his common law fraud claim. The court found that, as a matter of law, Ronald M. Hill could not bring a cause of action based on common law fraud. This finding is sufficient to sustain a motion to dismiss in the present

case. *Hill Resources, Inc. v. Federal Deposit Ins. Corp.*, No. CIV-87-267-R, (W.D. Okla. Oct. 27, 1987) (order granting summary judgment). Therefore, Ronald M. Hill's claim based on common law fraud should be dismissed against defendants, Kerr and Johnstone.

IT IS ORDERED, ADJUDGED AND DECREED

that the motion to dismiss of defendants, Stephen R. Kerr and William O. Johnstone, is treated as a motion for summary judgment and is granted.

Entered on the Judgment Docket this 13th day of September, 1988.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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|---|---|---|
| HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. CIV-88-226-B |
| STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation, | ) | |
| Defendants. | ) | |

**ORDER GRANTING DEFENDANTS UNITED OKLAHOMA BANKSHARES, INC. AND MORRISON G. TUCKER'S MOTION TO DISMISS**

This matter comes before the court on a motion to dismiss by United Oklahoma Bankshares, Inc. ("UOB") and Morrison G. Tucker. After careful consideration of the briefs and legal authorities, the motion is granted.

The motion of UOB and Tucker was filed pursuant to Rule 12(b)(6) and Rule 9(b), Fed.R.Civ.P. Rule 9(b) requires that "all averments of fraud [and] the circumstances constituting fraud...shall be stated with particularity." There are several purposes for this rule: (1) Lawsuits should be initiated as a "redress for wrong rather than attempting to discover unknown wrongs;" *D&G Enterprises v. Continental Illinois Bank and Trust Co. of Chicago*, 574 F.Supp. 263 (N.D. Ill. 1983) (*citing Gross v. Diversified Mortgage Investors*, 431 F.Supp. 1080, 1087 (S.D.N.Y. 1977), aff'd. 636 F.2d 1201 (2d Cir. 1980); (2) Harm to defendants of a false charge of fraud should be avoided, *Kronfeld v. First Jersey National Bank*, 638 F.Supp. 1454 (D.N.J. 1986); and (3) Each defendant should be put on notice of the particular part played by that defendant. *D&G Enterprises*, 574 F.Supp. at 267. Thus the complaint must include time, place, the contents of the representations, and the identity of the party making them. Id. This requirement applies to RICO as it applies to common law fraud. *Soper v. Simmons Int'l Ltd.*, 632 F.Supp. 244 (S.D.N.Y. 1986).

Instead of alleging the facts with particularity as to each defendant, plaintiffs have lumped dates and circumstances together. For instance, the plaintiffs borrowed money from October 1981, through February, 1986. Complaint, paragraph 9. The plaintiffs then state the defendants Kerr, Johnstone, and Tucker, at all times during the above period misrepresented the prime rate to its customers, which representations were authorized by UOB. Clearly, these allegations are not set out such that the defendants are on notice of who made the representations and when, other than generally, those were made.

These allegations do not comply with Rule 9(b)'s requirement that the time, place, contents of the representations, and identity of persons making such representations be stated with particularity. See Fed.R.Civ.P. 9(b); *Coronet Ins. Co. v. Seyfarth*, 665 F.Supp. 661, 666 (N.D. Ill. 1987); *Cook v. Zions First Nat'l Bank*, 645 F.Supp. 423, 425 (D.Utah 1986); *Van Dorn CO., Cent. States Can Co. Div. v. Howington*, 623 F.Supp 1548 (N.D. Ohio 1985). Additionally, the RICO complaint requires the allegations of facts showing reliance on the alleged false statements. *Blount Financial Services, Inc. v. Walter E. Heller & Co.*819 F.2d 151, 152 (6th Cir. 1987). This the plaintiffs have failed to do. Therefore, the plaintiffs have failed to fulfill their responsibility under Fed.R.Civ.P. 9(b) and 12(b)(6).

IT IS THEREFORE ORDERED that the motion to dismiss filed by defendants UOB and Tucker is granted.

The plaintiffs have ten (10) days within which to file an amended complaint.

Entered in Judgment Docket this 26th day of September 1988.

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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|---|---|---|
| HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. CIV-88-226-B |
| STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation, | ) | |
| Defendants. | ) | |

**ORDER DENYING MOTION TO RECONSIDER**

This matter comes before the court on plaintiffs' Motion to Reconsider. The plaintiffs argue that it was improper for the court to consider defendants' Motion to Dismiss as a motion for summary judgment. The

impropriety, plaintiffs contend, arises because they did not have adequate notice of the defendants' factual contentions and were not given adequate time for discovery.

A motion to reconsider is not for the purpose of appealing an order, and the purposes are limited under Local Rule 14(G). As the defendants have noted, the plaintiffs have failed to identify the grounds on which their Motion to Reconsider is based. So the court, from a review of plaintiffs' brief, assumes that the grounds are to correct a mistake of law or fact, prevent manifest injustice, that is, that there has been an abuse of discretion. See *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656 (N.D. Ill. 1983).

For several reasons, the plaintiffs' argument fails. First, the plaintiffs attached documents outside the pleadings for the court's consideration. See *Nichols v. United States*, 796 F.2d 361, 364 (10th Cir. 1986); *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985). Second, on June 15, 1988, the defendants, in their Motion and Brief in Support of Plaintiffs' Brief in Opposition to the Motion to Dismiss Filed by Defendants Stephen R. Kerr and William O. Johnstone, asked the court to consider their Motion to Dismiss as one for summary judgment. At that time the plaintiffs could have filed an objection, filed a motion to compel compliance with Local Rule 14(B), or asked for leave to supplement their response. Instead, they choose to do nothing and to appeal through a motion to reconsider.

Third, plaintiffs have attached the deposition of Morrison G. Tucker, taken on February 24, 1988; the Affidavit of Edwin J. Lippman, Jr., filed on May 5, 1988; and the affidavits of Irving A. Hill and Ronald M. Hill who as the plaintiffs were at all times available to plaintiffs' counsel. Thus, all the plaintiffs' counsel should have had access to all the information in the documents attached to the Motion to Reconsider at the time they filed their brief in opposition to the motion to dismiss. Further, at least some investigation should have been done under Rule 11 of the Federal Rules of Civil Procedure before the Complaint was filed.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Reconsider is denied.

Dated this 18th day of October, 1988.

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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|---|---|---|
| HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. CIV-88-226-B |
| STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation, | ) | |
| Defendants. | ) | |

**ORDER GRANTING MOTION TO DISMISS**

This matter comes before the court on Motion to Dismiss of the defendants Stephen R. Kerr and Wm. O. Johnstone. No response has been filed. On September

13, 1988, this court granted summary judgment in favor of Kerr and Johnstone. Subsequently, the plaintiffs filed an Amended Complaint, once again asserting the same allegations as in the original Complaint. Since summary judgment was granted on those issues, the Amended Complaint, insofar as it relates to defendants Kerr and Johnstone, is dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendants Stephen R. Kerr and Wm. O. Johnstone's Motion to Dismiss is granted.

Entered in Judgment Docket this 7th day of November, 1988.

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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| HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. CIV-88-226-B |
| STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation, | ) | |
| Defendants. | ) | |

**ORDER GRANTING MOTION FOR SANCTIONS**

This matter comes before the court on defendants, Stephen R. Kerr and William O. Johnstone's (the "Defendants") motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure and attorney's fees and

costs based on those sanctions. Hearing on the motion was held November 1, 1988.

Rule 11 requires counsel to make a reasonable inquiry into the facts and law before filing a complaint or an amended complaint. Compliance with Rule 11 is to be determined by viewing what inquiry was undertaken at the time of filing the pleading. *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987). At the time of filing, the attorney must have acquired information that supports his claims rather than solely relying on his clients' statements. *O'Rourke v. City of Norman*, 640 F.Supp. 1451, 1469 (W.D. Okla. 1986).

On February 123, 1988, Hill Resources, Inc., Irving A. Hill, and Ronald M. Hill (the "Plaintiffs"), filed the present lawsuit based on common law fraud and 18 U.S.C. §§1961-62 ("RICO") with the alleged predicate act of mail fraud under 18 U.S.C. §1341. At that time, *Hill Resources, Inc. v. Federal Deposit Insurance Corp.*, Case No. CIV-87-267-R, involving the same Plaintiffs and identical causes of action as the present case, and *Federal Deposit Insurance Corp. v. Hill Resources, Inc.*, Case No. CIV-87-767-T, were pending in this district. From the depositions of Ronald Hill and Irving Hill taken in Case No. CIV-87-767-T, it is clear that neither Kerr nor Johnstone made any misrepresentations to the Plaintiffs regarding the base rate or prime rate of interest charged by the United Bank of Oklahoma ("UBO") where the Defendants were employed as officers. Rather, the Plaintiffs' claims for fraud were based on their own

misconceptions of the meaning of the terms "prime rate" and "base rate."

The Plaintiffs and their counsel have not shown that a reasonable inquiry was made before the complaint was filed to determine if the allegations contained therein were well-grounded in fact and supported by law. In fact, Plaintiffs' own statements both in the depositions and at the hearing negate any support for the allegation that reasonable inquiry was made. Ronald Hill was a director of UBO during times that he alleges he was defrauded. Thus, before filing this suit, Ronald Hill had access to information related to the loans being made by UBO. Transcript of Hearing at 94-95 (November 1, 1988) [hereinafter cited as Transcript]. However, he did not use this available information to ascertain the truth of the facts alleged in the complaint. See Transcript at 111-12.

Plaintiffs' counsel has offered no evidence that he made a reasonable inquiry into the facts alleged in the complaint or the law underlying the complaint before filing this suit. In contrast, the defendants offered the expert testimony of Andrew Coats. He testified that the complaint should have never been filed because it was not well-grounded in the facts. Transcript at 20.

On September 13, 1988, this Court granted the Defendants' Kerr and Johnstone's motion to dismiss treating it as a motion for summary judgment. On September 26, 1988, this court granted the motion to

dismiss filed by Defendants United Oklahoma Bankshares, Inc., and Morrison G. Tucker and authorized the Plaintiffs to file an amended complaint within ten days thereof. On September 27, 1988, the Plaintiffs filed a motion to reconsider the court's ruling dated September 13, 1988.; In compliance with the court's order of September 26, 1988, the Plaintiffs filed an amended complaint on October 6, 1988.; On October 19, 1988, this court issued an order denying Plaintiffs' motion to reconsider.

Plaintiffs argue that inclusion of Kerr and Johnstone in the amended complaint would have waived the right to appeal the order granting Defendants' motion to dismiss which was treated as a motion for summary judgment. However, the plaintiffs have failed to cite any authority which supports this allegation. In fact, none of the cases cited by Plaintiffs involved an order granting summary judgment.

The Plaintiffs' cited authority does stand for the proposition that the failure to include Kerr and Johnstone as Defendants in the Amended Complaint would have had the effect of an order dismissing them from the action. See *Gravitt v. Southwestern Bell Telephone Co.*, 396 F.Supp. 948 (1975). But the September 13, 1988, order was a judgment on the merits and had dismissed the Defendants from this action. Thus, the allegations against Kerr and Johnstone in the Amended Complaint were unnecessary and unwarranted. So the inclusion of Kerr and Johnstone in the amended

complaint was unreasonable and not warranted by existing law.

Defendants, Kerr and Johnstone, have asked for attorney's fees and costs as an appropriate sanction under Rule 11. The undisputed expert testimony at the hearing confirms that the requested fees are fair and reasonable. Transcript at 19.

The court hereby finds the Plaintiffs' counsel, Allen DeVore, in violation of Rule 11 of the Federal Rules of Civil Procedure for filing a complaint and amended complaint without making reasonable inquiry into the facts to determine if they were well grounded and to determine if the pleadings and allegations contained therein were warranted by existing law or a good faith extension thereof. Therefore, the Plaintiffs and Plaintiffs' counsel, Allen DeVore, are ordered to pay, jointly and severally, to the Defendants, Kerr and Johnstone, attorney fees and expenses in the amount of Eighteen Thousand, Nineteen Dollars and Eight Cents. ($18,019.08).

IT IS THEREFORE ORDERED that Defendants William O. Johnstone and Stephen R. Kerr's Motion for Award of Attorney's Fees and Expenses and the supplement thereto is granted.

Dated this 1st day of December, 1988.

**APPENDIX F**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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| HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. CIV-88-226-B |
| STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation, | ) | |
| Defendants. | ) | |

## ORDER DENYING MOTION TO RECONSIDER

This matter comes before the court on a Motion to Reconsider filed by the plaintiffs, Hill Resources, Inc., Irving A. Hill, and Ronald M. Hill (Plaintiffs).

Rule 60(b) of the Federal Rules of Civil Procedure sets out the reasons for granting a motion to reconsider. The Plaintiffs have not made it apparent upon which reason(s) they are basing their motion. A reading of the motion and brief indicates that Plaintiffs are relying on Rule 60(b)(6): "any other reason justifying relief. . . ."

The court, in its order granting defendants' Motion For Sanctions dated December 1, 1988, set out the facts supporting its order. The Plaintiffs have failed to present reasons and facts justifying relief from the December 1, 1988, order.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Reconsider is denied.

DATED this 10th day of January, 1989.

**APPENDIX G**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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| HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. CIV-88-226-B |
| STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation, | ) | |
| Defendants. | ) | |

**ENTRY OF FINAL JUDGMENT**

NOW this matter comes on for consideration before the Honorable Luther Bohanon, Judge of the United

States District Court for the Western District of Oklahoma. After examining the file herein and noting that this Court has sustained Defendants Stephen R. Kerr and William O. Johnstone's Motion for Summary Judgment and Motion for Award of Attorney's Fees and Expenses, the Court finds that there is no just reason for delay of Entry of Final Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants, Stephen R. Kerr and William O. Johnstone are granted judgment against Plaintiffs on all causes of action of Plaintiffs' Complaint, thereby dismissing all of Plaintiffs' claims against Defendants Stephen R. Kerr and William O. Johnstone.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to Fed. R. Civ. P. 11, Defendants Stephen R. Kerr and William O. Johnstone are granted judgment against Plaintiffs and Plaintiffs' counsel, Allan DeVore, that Plaintiffs and their counsel must pay, jointly and severally, to Defendants Stephen R. Kerr and William O. Johnstone, attorney's fees and expenses in the amount of $18,019.08.

Entered in Judgment Docket this 19th day of January 1989.

**APPENDIX H**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

| | |
|---|---|
| HILL RESOURCES, INC., a corporation, IRVING A. HILL,an individual, and RONALD M.HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) |
| Plaintiffs-Appellants, | ) |
| and | ) |
| ALLAN DEVORE, | ) No. 89-6045 |
| Appellant, | ) (D.C. Civil ) No. 88-226- |
| v. | ) B) (W.D. ) Okla.) |
| STEPHEN R. KERR, an individual, and WILLIAM O. JOHNSTONE, an individual, | ) |
| Defendants-Appellees, | ) |
| MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC.,an Oklahoma bank holding corporation, | ) |
| Defendants. | ) |

## ORDER AND JUDGMENT*

Before EBEL, SETH and McWILLIAMS, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Irving A. Hill, Ronald M. Hill ("the Hills"), and their attorney, Allan DeVore, appeal the district court's order granting Stephen R. Kerr and William O. Johnstone's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure and attorney's fees and costs based on those sanctions. We affirm.

On February 12, 1988, the Hills filed suit against appellees, among others, charging common law fraud, violations of the RICO Act, 18 U.S.C. §§1961-62, and

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

mail fraud, 18 U.S.C. §1341. Appellees moved to dismiss the complaint. The district court treated the motion to dismiss as a motion for summary judgment, and granted summary judgment in favor of appellees. The Hills filed a motion to reconsider the order. Appellees moved for sanctions under Rule 11, and attorney's fees and costs. After summary judgment, and while their motion to reconsider was pending, the Hills filed an amended complaint naming appellees as defendants again. Appellees amended their motion for sanctions to seek sanctions against Allan DeVore as well as the Hills. After an extensive hearing, the district court awarded sanctions against appellants.

In the Tenth Circuit we apply an abuse-of-discretion standard across the board to all Rule 11 issues. *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir.). Appellants, citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir.), apparently assume that in Rule 11 cases we apply the three-tier standard, which calls for de novo review of whether the sanctioned behavior violated Rule 11. Perhaps for this reason they attempt to reargue their case on appeal, rather than demonstrate how the trial court abused its discretion in this case. In *Adamson v. Bowen*, 855 F.2d at 673 n.6, we expressly rejected the standard espoused in *Zaldivar*, and decline to embrace that standard today.

Appellants alleged in their complaint that appellees had misrepresented the meaning of "prime rate" or "base rate" in negotiating a loan with appellants. However,

appellants came forward with no evidence purported to show that appellees had made such misrepresentations. The Hills' depositions in a prior, nearly identical case indicated that neither of them was aware of any such statements by appellees. At the sanctions hearing, Ronald Hill finally testified that appellees made such misrepresentations, but the district court apparently discounted this eleventh-hour recollection. The Hills had never before presented testimony to this effect, either by deposition or affidavit, even in opposition to appellees' motion to dismiss. A reasonable inquiry would have uncovered the lack of support for the allegations against appellees in the Hills' original complaint.

Appellants also appeal the district court's award of sanctions based on the Hills' amended complaint naming appellees as defendants after appellees had won summary judgment on the original complaint. Appellants argue that the failure to name appellees in their amended complaint would have waived the Hills' rights under their pending motion to reconsider and their right to appeal the district court's order granting summary judgment. Appellants present no case to support this proposition. We agree with the district court that including appellees in the amended complaint, and forcing them to defend themselves against the same accusations upon which they had already prevailed, was unreasonable and not warranted by existing law. Furthermore, the amended complaint perpetuated the deficiencies of the original complaint. We find no abuse of discretion by the trial court.

The judgment of the district court is AFFIRMED.
The mandate shall issue forthwith.
Entered for the Court

August 17, 1989.

**APPENDIX I**
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

| | | |
|---|---|---|
| HILL RESOURCES, INC, a corporation; IRVING A. HILL, an individual, and RONALD M. HILL, an individual, for themselves and on behalf of all other persons similarly situated, | ) | |
| Plaintiffs-Appellants, | ) | |
| v. | ) | No. 89-6045 |
| STEPHEN R. KERR, an individual, WM. O. JOHNSTONE, an individual, MORRISON G. TUCKER, an individual, and UNITED OKLAHOMA BANKSHARES, INC., an Oklahoma bank holding corporation, | ) | |
| Defendants-Appellees. | ) | |

**ORDER**

Before EBEL, SETH and McWILLIAMS, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

October 31, 1989

# APPENDIX J
# RULE 11
# FEDERAL RULES OF CIVIL PROCEDURE

**Signing of Pleadings, Motions, and Other Papers; Sanctions.**

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the

pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.